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of the case.**

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**IN THE  
COURT OF APPEALS OF INDIANA**

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RICHARD L. ARNOLD and JACQUELYN A. )  
ARNOLD, Individually and as Co-Personal )  
Representatives of the ESTATE OF STEVEN C. )  
ARNOLD, deceased, )  
 )  
Appellants-Plaintiffs, )  
 )  
vs. )  
 )  
NEW HORIZONS HOME HEALTH CARE, )  
a/k/a NEW HORIZONS HOME HEALTH )

No. 02A04-0507-CV-375

SERVICES, PARKVIEW HOSPITAL, and )  
DREW MARTIN THURBER, )  
 )  
Appellees-Defendants, )  
\_\_\_\_\_)  
 )  
PARKVIEW HOSPITAL, )  
 )  
Cross-Appellant/Defendant. )

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APPEAL FROM THE ALLEN SUPERIOR COURT  
The Honorable Daniel G. Heath, Judge  
Cause No. 02D01-9901-CT-21

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**September 26, 2006**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BARNES, Judge**

**Case Summary**

Richard and Jacquelyn Arnold appeal the trial court's granting and partial granting of motions for summary judgment filed by New Horizons Home Health Care a/k/a New Horizons Home Health Services ("New Horizons") and Parkview Hospital ("Parkview"). Parkview cross-appeals the partial denial of its supplemental motion for summary judgment. We affirm in part, and reverse in part, and remand.

**Issues**

The Arnolds raise two issues, which we restate as:

- I. whether the trial court properly granted New Horizons' motion for summary judgment; and

II. whether the trial court properly partially granted Parkview's supplemental motion for summary judgment.

On cross-appeal, Parkview raises several issues, which we consolidate and restate as whether the trial court properly partially denied its motion for summary judgment.

**Facts**

The Arnolds's son, Steven, was paralyzed by spinal muscular atrophy when he was born. In January 1985, Steven was infected with HIV during a blood transfusion. In 1997, because of his deteriorating health, it became necessary for Steven to receive home healthcare services. Drew Thurber<sup>1</sup> was a registered nurse employed by New Horizons and assigned to care for Steven in the Arnolds's home in July or August of 1997.

In August 1997, the morphine prescribed to manage Steven's pain did not appear to be working. In October 1997, Steven was admitted to Parkview and diagnosed with an infection. The source of the infection was not identified. During this hospital stay, Steven's arm was broken when a Parkview employee transferred Steven from his bed to a wheelchair.

From October 2, 1997 until December 20, 1997, Steven was admitted to and released from Parkview four times. During this time Thurber continued to provide in-home nursing care to Steven. While Steven was a patient at Parkview, Parkview contracted with New Horizons to provide nightly monitoring of Steven. Thurber was one

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<sup>1</sup> Thurber was fired from Parkview in 1992 after diverting meperidine and morphine for his own use. His license was indefinitely suspended on April 29, 1992, after he tested positive for buprenorphine hydrochloride, a class V controlled substance. His license was reinstated on September 21, 1995.

of the New Horizons nurses to provide nursing care for Steven at Parkview. While caring for Steven, Thurber tampered with Steven's intravenous morphine drip bags by removing the morphine from the bags and replacing it with what appears to have been tap water.

On December 16, 1997, while Thurber was working at Parkview, another nurse observed Thurber tampering with Steven's intravenous line. The nurse reported this incident to Parkview. The next morning, Thurber explained to Jacquelyn that another nurse had observed him removing air from Steven's intravenous line. Steven was discharged from the hospital on December 20, 1997.

On December 22, 1997, the Arnolds discovered that the intravenous bags of morphine were leaking. On December 23, 1997, Parkview, the supplier of the bags, retrieved the bags for testing. That same day, Parkview received the test results indicating that the bags contained less than "10% of prescribed concentration." Appellants' App. p. 161. Parkview's December 23, 1997 notes indicated, "Agency notified of bags found with possible tampering, and patient's mother notified as well, since care possibly compromised, of the found bags and that Parkview was investigating this, and that New Horizons was notified of occurrence." Id. On December 27, 1997, Parkview noted that the Arnolds and "Physician" were notified of the results of the analysis of the leaking bags. Id.

At 1:30 a.m., on January 6, 1998, Jacquelyn observed Thurber in a bathroom in their home with a syringe, a bottle of water, and other items. Jacquelyn immediately reported the incident to New Horizons, and New Horizons told Jacquelyn to send Thurber home. After this incident, New Horizons requested on more than one occasion that

Thurber be permitted to return to the Arnold home to continue to provide nursing care to Steven. The Arnolds refused. Steven's health continued to decline, and he died in December 1998.

On January 15, 1999, the Arnolds, both individually and as personal representatives of Steven's estate, filed a complaint against Parkview, New Horizons, and Thurber. On February 8, 1999, the Arnolds filed a proposed complaint with the Indiana Department of Insurance ("Department of Insurance"). On November 1, 1999, New Horizons moved for preliminary determination and summary judgment. On December 23, 1999, the Arnolds responded to New Horizons' motion for summary judgment. On February 9, 2000, the Arnolds filed an amended proposed complaint with the Department of Insurance. On May 5, 2000, the trial court granted the Arnolds's motion to amend their complaint. On July 3, 2000, New Horizons filed a reply brief in support of its motion for summary judgment. On November 3, 2000, the trial court denied New Horizons' motion for preliminary determination and summary judgment.

On May 13, 2002, the Medical Review Panel ("Review Panel") of the Department of Insurance reviewed the evidence submitted by the parties and issued a unanimous decision. Regarding Thurber and Parkview, the Review Panel found:

1. The evidence supports the conclusion that said Defendants failed to comply with the appropriate standard of care as charged in the Complaint.
2. The conduct complained of was a factor of the resultant damages.

Appellants' App. p. 146. As to New Horizons, the Review Panel found, "There is a material issue of fact, not requiring expert opinion, bearing on liability for consideration by the court or jury, namely: what were the communications between the patient's mother and New Horizon personnel on January 6, 1998." Id. at 147.

On August 6, 2002, the Arnolds moved for summary judgment against Parkview and Thurber.<sup>2</sup> On January 28, 2003, Parkview moved for summary judgment, and on January 30, 2003, New Horizons moved for summary judgment. The Arnolds responded to these motions. On April 2, 2003, Parkview filed a reply brief, a supplemental designation of evidence, and a motion to strike.

On June 19, 2003, the trial court ruled on the pending motions. It first summarized the Arnolds's claims as:

- (1) New Horizons failed to exercise reasonable care in hiring, supervising, and retaining Thurber;
- (2) Parkview and New Horizons knew or should have known of Thurber's drug history and prior suspensions and provided the same information to Plaintiffs and [Steven's] treating physician;
- (3) Parkview and New Horizons negligently failed to inform the Plaintiffs and [Steven's] treating physician of Thurber's improper contact with [Steven's] intravenous line and morphine bags.
- (4) New Horizons was negligent in failing to promptly and properly investigate Thurber's conduct after January 6, 1998;

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<sup>2</sup> It is unclear when or whether the trial court ruled on this motion.

- (5) During [Steven's] first hospitalization in October 1997, a Parkview employee negligently transferred [Steven] from his bed fracturing [Steven's] arm; and
- (6) As a direct and proximate result of the above conduct, [Steven] suffered injury.

Id. at 16.<sup>3</sup>

The trial court also observed:

Since the rendering of the [Review Panel's] opinion, Parkview and New Horizons have come forward with additional evidence. After reviewing this additional documentation, all three members of the [Review Panel] changed their opinions under oath. Specifically, Dr. Brockman signed an affidavit stating that his sole criticism of Parkview was the lack of any follow-up by Parkview with New Horizons and [Steven's] treating physician regarding Thurber's dilution of the morphine bags. He further stated that, based on additional documentation provided by Parkview indicating that the tampering was in fact reported to New Horizons and the treating physician, that Parkview's care of [Steven] fell within the appropriate standard of care. In their depositions, the other two panel members, Angela Seiman and Mary Lynn Kessler, also altered their opinions to echo that of Dr. Brockman with regards to Parkview's conduct.

With regard to New Horizons' conduct, Dr. Brockman stated that it had been the opinion of the [Review Panel] that New Horizons had not been negligent in the hiring of Thurber, and that the only issue was whether New Horizons had documented Mrs. Arnold's phone call on January 6, 1998. Based on additional documentation provided by New Horizons, Dr. Brockman opined that there was no longer any material issue of fact and that New Horizons had not breached the standard of care. Ms. Seiman also changed her opinion to echo that of Dr. Brockman. Ms. Kessler stated that

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<sup>3</sup> In its order, the trial court noted that although the above theories were not clearly set out in the Arnolds's amended complaint, the Arnolds complied with the notice pleading standard regarding these claims.

her sole criticism of New Horizons was that it had attempted to replace Thurber in the Arnold home after Mrs. Arnold's January 6, 1998 phone call. However, she further stated that since Thurber had never actually returned to the Arnold home, there was no injury to the Arnolds.

Id. at 17.

After specifically addressing each claim, the trial court granted New Horizons' motion for summary judgment as to all of its claims and granted Parkview's motion for summary judgment as to all claims except regarding whether Parkview negligently failed to inform the Arnolds and Steven's physician of Thurber's contact with Steven's intravenous line in December 1997, and whether Parkview negligently transferred Steven and broke his arm.

On July 16, 2003, the Arnolds moved to have the trial court's order certified for interlocutory appeal. On July 24, 2003, Parkview filed a "Supplemental Motion for Partial Summary Judgment" on the remaining issues. The Arnolds responded and moved to strike a portion of Parkview's designated evidence, and Parkview replied. On February 9, 2005, the trial court granted in part and denied in part Parkview's motion for summary judgment. On May 8, 2005, the Arnolds requested clarification of the trial court's order. On May 27, 2005, the Arnolds and Parkview filed a joint motion for certification. That motion was granted, and we accepted jurisdiction of the appeal.

### **Analysis**

Summary judgment is used to terminate litigation about which there is no factual dispute and which may be determined as a matter of law. Bushong v. Williamson, 790 N.E.2d 467, 474 (Ind. 2003). The standard of review for summary judgment is the same

as that used in the trial court: “summary judgment is appropriate only where the evidence shows there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” Id. at 473 (citing Ind. Trial Rule 56(C)). All facts and reasonable inferences drawn therefrom are construed in favor of the non-moving party. Id. Our review of a summary judgment motion is limited to the materials designated to the trial court. Id. We are also prohibited from reversing summary judgment orders on the ground that there is a genuine issue of material fact unless the material facts and relevant evidence were specifically designated to the trial court. Rosi v. Business Furniture Corp., 615 N.E.2d 431, 434 (Ind. 1993).

“Relying upon specifically designated evidence, the moving party bears the burden of showing that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law.” Shepherd v. Truex, 819 N.E.2d 457, 461 (Ind. Ct. App. 2004). If the moving party meets these requirements, the burden shifts to the non-movant to designate facts showing that there is a genuine issue for trial. Id. “If the opposing party fails to meet its responsive burden, the court shall render summary judgment.” Bushong, 790 N.E.2d at 474.

## ***I. The Granting of New Horizons’ Motion for Summary Judgment***

### ***A. Negligent Hiring and Retention<sup>4</sup>***

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<sup>4</sup> In their Appellant’s Brief the Arnolds frame the negligent hiring and retention claims around New Horizons. They do not appear to argue that Parkview negligently hired or retained Thurber until their reply brief. This issue is waived. See Monroe Guar. Ins. Co. v. Magwerks Corp., 829 N.E.2d 968, 977 (Ind. 2005) (“The law is well settled that grounds for error may only be framed in an appellant’s initial brief and if addressed for the first time in the reply brief, they are waived.”).

The Arnolds first argue that they had no notice that New Horizons was moving for summary judgment as to the Arnolds's non-medical malpractice claims of negligent hiring and retention because its motion for summary judgment addressed claims of medical malpractice. New Horizons contends that the trial court properly considered the Arnolds's negligent hiring and negligent retention claims as medical malpractice claims and that the Review Panel members' subsequent statements establish there are no genuine issues of material fact regarding "whether New Horizons breached the applicable standard of care with respect to its hiring and supervision of Thurber." Appellee New Horizons' Br. p. 22.

Indiana has long recognized a cause of action for the negligent hiring and retention of an employee.<sup>5</sup> Konkle v. Henson, 672 N.E.2d 450, 454 (Ind. Ct. App. 1996). To

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<sup>5</sup> Indiana has adopted the Restatement (Second) of Torts § 317 (1965) as the standard with regard to this tort. Konkle, 672 N.E.2d at 454. That Section provides:

A master is under a duty to exercise reasonable care so to control his servant while acting outside the scope of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if

(a) the servant

- (i) is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant, or
- (ii) is using a chattel of the master, and

(b) the master

- (i) knows or has reason to know that he has the ability to control his servant, and
- (ii) knows or should know of the necessity and opportunity for exercising such control.

determine liability for the negligent hiring or retention of an employee, the court must determine if the employer exercised reasonable care. Id. at 454-55. To prevail on a claim, the plaintiff must show that the employer knew or had reason to know of the employee's misconduct and failed to take appropriate action. Grzan v. Charter Hosp. of Northwest Indiana, 702 N.E.2d 786, 793 (Ind. Ct. App. 1998).

On the other hand, to establish a claim of medical malpractice, the plaintiff must show: “(1) duty owed to plaintiff by defendant, (2) breach of duty by allowing conduct to fall below the applicable standard of care, and (3) compensable injury proximately caused by defendant's breach of duty.” Bader v. Johnson, 732 N.E.2d 1212, 1216-17 (Ind. 2000). To be granted summary judgment in a negligence action, the movant must demonstrate that the undisputed material facts negate at least one element of the plaintiff's claim. City of Muncie ex rel. Muncie Fire Dep't v. Weidner, 831 N.E.2d 206, 211 (Ind. Ct. App. 2005), trans. denied (2006).

New Horizons asserts that the Review Panel members actually considered the negligent hiring and retention claims in their review of the case. However, that two of the Review Panel members subsequently testified in their depositions that they considered the negligent hiring claims in rendering the Review Panel's opinion is not in and of itself enough to establish that those claims are in fact medical malpractice claims. Instead, we look to the Act to determine whether the Arnolds's negligent hiring and retention claims are medical malpractice claims.

The Medical Malpractice Act (“the Act”) defines “malpractice” as “a tort or breach of contract based on health care or professional services that were provided, or

that should have been provided, by a health care provider, to a patient.” Ind. Code § 34-18-2-18. In discussing the applicability of the Act, we have observed, “The text of the Act itself thus leads one to conclude that the General Assembly intended to exclude from the legislation’s purview conduct of a provider unrelated to the promotion of a patient’s health or the provider’s exercise of professional expertise, skill or judgment.” Collins v. Thakkar, 552 N.E.2d 507, 510 (Ind. Ct. App. 1990), trans. denied. Further,

the Act was a precisely tailored response to the difficulties encountered by health care providers in obtaining professional liability insurance; it is not related to the sort of liability a provider is exposed to generally, whether that be liability arising as a consequence of the condition of the health care provider’s premises or a criminal act. The legislature’s establishment of a medical review panel, the sole purpose of which is to provide an expert determination on the question of whether a provider complied with the appropriate standard of care, suggests that the scope of the Act is likewise confined to actions premised upon the exercise of professional judgment.

Id. at 510-11.

Relying on the Act’s definition of “health care,” which is “an act or treatment performed or furnished, or that should have been performed or furnished, by a health care provider for, to, or on behalf of a patient during the patient’s medical care, treatment, or confinement[,]” New Horizons argues that its hiring of employees to care for its patients and its supervision of its employees caring for its patients are actions undertaken for the ultimate benefit of its patients. I.C. § 34-18-2-13. Based on the Act’s definitions of “malpractice” and “healthcare” and Collins’s assessment of the purpose of the Act, however, New Horizons’ argument is unavailing.

New Horizons' hiring and retention of Thurber is not considered "malpractice" under the Act because it is not based on health care or professional services that were provided by New Horizons to Steven. See I.C. § 34-18-2-18. Nor is the hiring and retention of Thurber by New Horizons considered "health care" because they are not acts furnished specifically on behalf of Steven's medical care, treatment, or confinement. See I.C. § 34-18-2-13. The Arnolds's negligent hiring and retention claims against New Horizons are based on the employer/employee relationship with Thurber. These claims are not premised on New Horizons' exercise of professional judgment regarding Steven's care. See Collins, 552 N.E.2d at 511. Thus, the negligent hiring and retention claims are not medical malpractice claims that fall within the purview of the Act.

We are also not convinced that New Horizons moved for summary judgment on the negligent hiring and retention claims.<sup>6</sup> Indeed, in its memorandum in support of its motion for summary judgment, New Horizons requested summary judgment in its favor and against the Arnolds "on all of their claims." Appellants' App. p. 201. However, upon a careful reading of New Horizons' motion and memorandum, we are convinced that the substance of their motion is based on the Arnolds's medical malpractice claims. More specifically, it is based on the subsequent testimony from the Review Panel members and New Horizons' attempt to invalidate the Review Panel's opinion. For example, in its motion, New Horizons explains, "to survive summary judgment in a

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<sup>6</sup> There is no indication that the trial court sua sponte reconsidered its November 3, 2000 denial of New Horizons' motion for preliminary determination and summary judgment based on the additionally designated evidence.

medical malpractice action” and then focuses on expert medical testimony. Appellants’ App. p. 199.

Further, in support of its motion, New Horizons designated only the complaints, the Review Panel’s opinion, and the subsequent depositions of Review Panel members. It did not designate evidence regarding its employment of Thurber.

In its memorandum, New Horizons makes the general argument, “Given the Medical Review Panel’s testimony, there is no evidence regarding negligence sufficient to create a genuine issue of material fact precluding summary judgment.” Appellants’ App. p. 203. It goes on to argue, “The pivotal issue in this case is whether [New Horizons’] medical care and treatment provided to Steven Arnold fell below the applicable standard of care and proximately caused any resultant damages.” Id. The memorandum then sets forth what is necessary for a plaintiff to survive summary judgment “in a medical malpractice action[.]” Id. at 204. The memorandum also compares the facts of this case to a medical malpractice case and concludes, “Since the Plaintiffs possess no expert testimony to establish a prima facie case on the issues of the standard of care and proximate cause, [New Horizons] is entitled to summary judgment as a matter of law.” Id. at 209.

Neither the motion for summary judgment nor the memorandum specifically addresses the negligent hiring and retention claims or sets forth that there are no genuine issues of material fact that New Horizons is entitled to judgment as a matter of law on these specific claims. Summary judgment decisions must be carefully reviewed to ensure that the parties are not improperly denied their day in court. Fraternal Order of Police,

Lodge No.73 v. City of Evansville, 829 N.E.2d 494, 496 (Ind. 2005). Further, “The evidence before the court must be liberally construed in the light most favorable to the non-moving party.” Butler v. City of Indianapolis, 668 N.E.2d 1227, 1228 (Ind. 1996). We believe that a broad construction of New Horizons’ motion for summary judgment and supporting memorandum would effectively deny the Arnolds their day in court regarding the negligent hiring and retention claims, and we do not believe such a reading is appropriate. In determining whether New Horizons has moved for summary judgment on the negligent hiring and retention claims, the policies behind summary judgment are best served by viewing the motion and memorandum in the light most favorable to the Arnolds.

Also, in their brief in opposition to New Horizons’ and Parkview’s motions for summary judgment, the Arnolds explained, “the issues not raised and still pending before the Court are (1) whether New Horizons and Parkview can be vicariously liable for the acts of their employee, Thurber, and (2) whether New Horizons and Parkview negligently hired and retained their employee, Thurber.” Appellants’ App. p. 256. It is clear that the Arnolds did not anticipate the trial court’s consideration of summary judgment on the negligent hiring and retention claims. This perspective was reasonable based on the language of New Horizons’ motion and supporting memorandum and the designated evidence. We conclude that New Horizons did not move for summary judgment on the negligent hiring and retention claims. Accordingly, the trial court improperly granted summary judgment with regard to these claims.

### ***B. Vicarious Liability***

The Arnolds also argue that the trial court failed to recognize their claim of vicarious liability based on the doctrine of respondeat superior. The Arnolds contend that New Horizons, as Thurber's employer, is liable for his actions and the resulting malpractice. "Under the vicarious liability theory of respondeat superior, 'an employer is liable for the acts of its employees which were committed within the course and scope of their employment.'" L.N.K. ex rel. Kavanaugh v. St. Mary's Medical Center, 785 N.E.2d 303, 307 (Ind. Ct. App. 2003), trans. denied.

Like the negligent hiring and retention claims, the Arnolds also argue that they had no notice that New Horizons was moving for summary judgment on their vicarious liability claim. Although the vicarious liability claim is a medical malpractice claim because it is derivatively based on Thurber's malpractice, we again conclude that New Horizons did not move for summary judgment on this claim.

As we discussed above, the general language in New Horizons' supporting memorandum requesting summary judgment "on all of their claims" is not sufficient to establish that it was actually moving for summary judgment on the Arnolds's vicarious liability claim. Appellants' App. p. 201. New Horizons' motion and memorandum are based specifically on the allegations of its medical malpractice, not Thurber's. In both, New Horizons contends that it did not breach the standard of care without discussion of whether Thurber was acting within the scope of his employment or whether he committed malpractice. Substantively, the motion and memorandum address only New Horizons' alleged malpractice.

Further, even if we were to conclude that New Horizons moved for summary judgment on the vicarious liability claim, New Horizons' designated portions of the Review Panel's depositions specifically address the Review Panel's finding regarding New Horizons. The designated evidence simply does not establish that there are no genuine issues of material fact regarding Thurber's negligence. Accordingly, the burden did not shift to the Arnolds to designate evidence showing that genuine issues of material fact exist. The trial court improperly granted summary judgment on this issue.

### *C. New Horizons' Alleged Malpractice*

The Arnolds claim that the trial court improperly granted summary judgment in favor of New Horizons on their medical malpractice claim. New Horizons asserts that after it designated the subsequent deposition testimony of the Review Panel members, the Arnolds "were required to present more than the Panel's original opinion as to New Horizons in order to create an issue of fact with respect to their medical malpractice claims against New Horizons." Appellants' Br. p. 37.

Indiana Code Section 34-18-10-22(b), which governs the Review Panel's expert opinion, provides:

After reviewing all evidence and after any examination of the panel by counsel representing either party, the panel shall, within thirty (30) days, give one (1) or more of the following expert opinions, which must be in writing and signed by the panelists:

- (1) The evidence supports the conclusion that the defendant or defendants failed to comply with the appropriate standard of care as charged in the complaint.

(2) The evidence does not support the conclusion that the defendant or defendants failed to meet the applicable standard of care as charged in the complaint.

(3) There is a material issue of fact, not requiring expert opinion, bearing on liability for consideration by the court or jury.

(4) The conduct complained of was or was not a factor of the resultant damages. If so, whether the plaintiff suffered:

(A) any disability and the extent and duration of the disability; and

(B) any permanent impairment and the percentage of the impairment.

In its original opinion, regarding New Horizons, the Review Panel concluded, “There is a material issue of fact, not requiring expert opinion, bearing on liability for consideration by the court or jury, namely: what were the communications between the patient’s mother and New Horizon personnel on January 6, 1998.” Id. at 147.

Mary Lynn Kessler, R.N., testified in her deposition that she was concerned about New Horizons attempting to place Thurber back in the Arnolds’s home but that she did not “feel [New Horizons] violated the standard of care in reporting what the family told them on January 6.” Id. at 243. She also testified that nothing that occurred after January 6, 1998, contributed to any damages. See id. at 241. New Horizons argues that this evidence “satisfied its burden of demonstrating that no genuine issue of material fact existed, at least with respect to the issue of causation.” Appellee New Horizons’ Br. p. 36. The Arnolds respond that the panel opinion itself put causation at issue in this case

because the Review Panel did not make a specific determination regarding causation and used the general term “bearing on liability.” Appellants’ Reply Br. p. 31.

The Arnolds rely on Sawlani v. Mills, 830 N.E.2d 932, (Ind. Ct. App. 2005), trans. denied, in which we addressed whether the trial court properly denied a physician’s motion for judgment on the evidence. In Sawlani, the issue was the alleged increased risk of harm that the delay in a diagnosis of breast cancer caused. The plaintiff’s sole evidence in support of the physician’s failure to meet the appropriate standard of care was the opinion of the medical review panel, which concluded that “the evidence submitted regarding [the physician] does support the conclusion that [the physician] failed to meet the appropriate standard of care as charged in the Complaint but it is a question of fact as to whether the conduct complained of was a factor of the resultant damages.” Sawlani, 830 N.E.2d at 940 (emphasis omitted and added). We recognized that our supreme court has held that a medical review panel opinion favorable to the plaintiff on the issue of proximate cause is sufficient to withstand a defendant’s motion for judgment on the evidence. Id. (citing Bonnes v. Feldner, 642 N.E.2d 217, 221 (Ind. 1994)). We did not further address the issue of causation. Id. at 940-41.

Sawlani, however, is inapposite to the facts before us today because the Review Panel did not conclude that there were questions of fact regarding whether the conduct complained of was a factor of the resultant damages. Instead, the Review Panel made no conclusions as to causation, let alone that there was an issue of fact as to causation. Further, we are unwilling to equate the Review Panel’s conclusion that “[t]here is a material of issue of fact, not requiring expert opinion, bearing on liability for

consideration by the court of jury . . . .” to a finding that there are questions of fact regarding causation. Appellants’ App. p. 147. Had the Review Panel believed there was a question fact regarding causation, the Review Panel could have concluded that “[t]he conduct complained of was or was not a factor of the resultant damages. . . .” as the Act provides. See I.C. § 34-18-10-22(b)(4). Because the Review Panel issued no conclusions regarding causation, the Review Panel’s opinion in and of itself is not sufficient to establish that there are genuine issues of material fact as to causation regardless of the Review Panel members’ subsequent deposition testimony.

Here, based on the Arnolds’s own affidavits, it is undisputed that despite New Horizons’ repeated requests to place Thurber back into the Arnolds’s home, the Arnolds refused, and Thurber never returned to their home after January 6, 1998. See Appellants’ App. p. 282, 288. Thus, even if, as the Review Panel concluded, there is a material fact bearing on liability regarding the communications between New Horizons and Jacquelyn, there is no evidence that New Horizons’ subsequent actions caused harm to Steven or the Arnolds after January 6, 1998. The trial court properly entered summary judgment in favor of New Horizons on this claim.<sup>7</sup>

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<sup>7</sup> In their original Appellants’ Brief, the Arnolds do not specifically address each malpractice claim alleged against New Horizons. It appears that the Arnolds’s argument is based only on their claim that New Horizons committed malpractice by failing to investigate Jacquelyn’s complaint about Thurber, not their failure to inform claims. Even if that is not the case, the Arnolds’s memorandum in response to the motions for summary judgment primarily address whether New Horizons breached the appropriate standard of care, not the issue of causation. On appeal, the Arnolds point to no evidence other than the Review Panel’s opinions as evidence of causation regarding their claims that New Horizons failed to inform the Arnolds and the treating physicians of Thurber’s history of drug use and whether New Horizons failed to inform the Arnolds and the treating physicians of Thurber’s contact with Steven’s intravenous lines and bags. Accordingly, to the extent that these issues may be properly before us, the Review Panel’s opinion alone is insufficient to create an issue of fact regarding causation.

## *II. The Granting of Parkview's Motion for Summary Judgment*

### *A. Vicarious Liability*

The Arnolds assert that their complaint included a claim of vicarious liability against Parkview and the trial court improperly granted summary judgment in favor of Parkview without specifically addressing this claim. The Arnolds correctly assert that Parkview did not challenge the Review Panel's conclusion that Thurber failed to comply with the appropriate standard of care and that the conduct complained of was a factor in the resultant damages. The Arnolds also contend that in caring for Steven, Thurber was acting within the scope of his employment with New Horizons and Parkview.

Parkview argues on appeal that it cannot be vicariously liable for Thurber's negligence because it was not Thurber's employer. Parkview contends no evidence was presented indicating that Thurber was an employee of Parkview. Parkview explains, "At most Thurber was an employee of an independent contractor of Parkview." Appellee Parkview's Br. p. 16.

In its motion for summary judgment, however, Parkview did not address the issue of vicarious liability or whether Thurber was an employee of Parkview. The only mention of Thurber's employment status with Parkview is in the facts section of the memorandum in support of Parkview's motion for summary judgment in which Parkview states, "Parkview contracted with the decedent's home healthcare nurses, including Thurber, through New Horizons, to provide nightly monitoring of the decedent while he was a patient at Parkview . . . ." Appellants' App. p. 132. Further, Parkview did not specifically designate evidence establishing that Thurber was not an employee of

Parkview or specifically argue that Thurber was not its employee. Parkview failed to show that there were no issues of material fact or that it was entitled to judgment as a matter of law on the issue of vicarious liability. Because Parkview did not move for summary judgment on this claim, the burden did not shift to the Arnolds to produce evidence that Parkview was vicariously liable for Thurber's misconduct. See Shepherd, 819 N.E.2d at 461. The trial court improperly granted summary judgment on this claim.

***B. Parkview's Alleged Malpractice***<sup>8</sup>

Regarding the direct malpractice claims against Parkview, the Arnolds contend that the trial court improperly failed to consider the Review Panel's decision as credible evidence creating a genuine issue of fact regarding their medical malpractice claims against Parkview. Parkview responds, "Because all three panel member changed their opinions, it was incumbent upon [the Arnolds] to come forward with expert testimony to refute the panel members' opinions to avoid summary judgment." Appellee Parkview's Br. p. 19.

We disagree with Parkview's assessment that there is no conflict in the evidence regarding the breach of the standard of care. Even if after being shown additional evidence, the Review Panel members individually concluded that Parkview did not did not breach the standard of care in informing the Arnolds and Steven's treating physicians of Thurber's misconduct, this subsequent testimony does not completely negate the

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<sup>8</sup> It appears that the only claims regarding Parkview's failure to inform on which the trial court granted summary judgment relate to the January 6, 1998 incident and Thurber's history of drug abuse.

original opinion of the Review Panel. The Review Panel's opinion is statutorily an "expert opinion." See Ind. Code § 34-18-10-22(b). Further, "A report of the expert opinion reached by the medical review panel is admissible as evidence in any action subsequently brought by the claimant in a court of law." I.C. § 34-18-10-23. Although this expert opinion is not conclusive and either party may call the Review Panel members as witnesses, any subsequent attack on that opinion goes to the weight of the original opinion.

There is a statutorily created reason for the Review Panel's conclusion to be admissible as an expert opinion. The subsequent testimony of Review Panel members does not in and of itself completely invalidate or erase the expert opinion rendered by the Review Panel. To conclude otherwise would render the Review Panel process irrelevant.

Also, the parties are responsible for submitting evidence to the Review Panel. See I.C. § 34-18-10-17(a). The information that led the Review Panel members to change their minds was in Parkview's control. If Parkview had wanted to submit the evidence that it relied on in the subsequent depositions to the Review Panel before it rendered its expert opinion, it could have done so.

In fact, in his deposition, Dr. Brockman testified that the Review Panel "requested to see if there was any additional paperwork trail that this was followed up by anybody in the hospital." Appellants' App. p. 184. Dr. Brockman stated that they waited two or three weeks and received a letter indicating that there was no additional paperwork at that time because Parkview was still attempting to obtain such. The Review Panel did not

receive any additional paperwork from Parkview. Seiman's and Kessler's testimony was consistent with Dr. Brockman's on this point.

Parkview did not timely supply the Review Panel with the information it specifically requested until after the Review Panel reached a decision contrary to Parkview's interests. Only then did Parkview supply this information to the Review Panel members individually as they were being deposed, a setting much different and considerably more adversarial than the Review Panel process.

Accordingly, we conclude that the Review Panel members' subsequent deposition testimony is not conclusive of whether Parkview met the standard of care in informing the appropriate parties of Thurber's misconduct. Instead, it is evidence to be weighed against the Review Panel's original expert opinion in which it concluded that Parkview "failed to comply with the appropriate standard of care . . . ." Id. at 146.

Further, in response to New Horizons' and Parkview's motions for summary judgment, the Arnolds offered the affidavit of Tella Hellwarth, R.N., who was employed by New Horizons until December 1998 and provided in-home nursing care to Steven. She stated that Parkview knew or should have known of Thurber's history of drug abuse and should have informed Steven, the Arnolds, and Steven's treating physicians of this information.<sup>9</sup> This evidence, in addition to the Review Panel's decision, was sufficient to establish genuine issues of material fact regarding whether Parkview met the standard of care.

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<sup>9</sup> Although Parkview moved to strike this paragraph, Paragraph 17, it appears that the trial court did not specifically strike it. The trial court appears to have only struck Paragraphs 8, 9, and 14.

### ***III. Parkview's Partial Motion for Summary Judgment***

After the trial court only partially granted Parkview's January 28, 2003, motion for summary judgment, on July 24, 2003, Parkview filed another motion for summary judgment on the remaining issues. The trial court partially granted this motion, and Parkview cross-appeals the partial denial of this motion.

#### ***A. Failure to Inform Steven and the Arnolds***

Parkview contends that the trial court improperly concluded that there are issues of fact regarding whether Parkview timely notified Steven and the Arnolds of Thurber's inappropriate contact with Steven's intravenous line because Thurber himself told Jacquelyn about the incident. Parkview contends that Steven and the Arnolds "could not have sustained injury as a result of not knowing the information because they did have the information." Appellee Parkview's Br. p. 23. Without citation to designated evidence, Parkview argues, "The only information that Parkview had on December 18, 1997, was that the nurse had observed Thurber with a syringe in the line. Thurber told the nurse the same story of extracting air, so Parkview had no other information than what was relayed to Mrs. Arnold by Thurber the next morning." Id.

The Arnolds respond that Thurber's report of the incident was neither complete nor accurate and, therefore, a question of fact exists regarding whether Parkview's failure to fully inform Steven and the Arnolds of Thurber's misconduct harmed Steven. The Arnolds's designated evidence includes an affidavit from Jacquelyn in which she stated:

19. During one of Steven's hospitalizations at Parkview in December 1997, Thurber reported to me that he had been caught by another nurse at Parkview accessing Steven's

morphine line. Thurber explained that he had observed air in Steven's intravenous line and was removing the air with a syringe when an [intravenous] team nurse entered Steven's room to hang a new medication bag. I was not aware of the arrangement between Parkview and the third shift nurses that stayed with Steven while he was a patient at Parkview. I was never informed as to the third shift nurses' duties and responsibilities while staying with Steven when he was a patient at Parkview. I had no reason to be suspicious of Thurber's behavior.

Appellants' App. p. 436. The Arnolds also designated portions of Tellwarth's affidavit in which she stated:

11. I provided in-room sitting services and observation for [Steven] when he was hospitalized at Parkview in 1997 and 1998. The policy and protocol of [Parkview] for us nurses placed in [Parkview] by [New Horizons] as a sitter and observe for [Steven] were:

- (a) Only [Parkview] Nurses and other members of its staff were permitted to administer medications to the patient;
- (b) Only [Parkview] nurses and other staff were permitted to care for the intravenous lines or other issues or problems involving intravenous services for the patient;
- (c) No syringes were available nor intended for use by sitter/observer nurses;
- (d) If a sitter/observer nurse noticed a problem of the patient involving medications or the intravenous lines, then that sitter/observer nurse was required to call a [Parkview] nurse or staff member on the floor for nursing/medical services for the patient.

12. I am aware that [Thurber] was a sitter/observer nurse for [Steven] at [Parkview] and in the fall of 1997 he violated and did not comply with these stated policies and protocols while on duty with [Steven]. He was observed tampering and

having direct contact with [Steven's] intravenous lines and intravenous bags while at the hospital.

13. It was a breach of the appropriate standard of care for a patient receiving in-home health care for [New Horizons] and [Parkview] not to immediately inform the patient and his family and his treating physicians that [Thurber], while a sitter/observer nurse for [Steven] at [Parkview] had been caught tampering with [Steven's] intravenous bags and lines in violation of the stated policy and protocol prohibiting such conduct.

Id. at 442-43.

In its Appellee's Brief, Parkview argues, "Mrs. Arnold was aware that according to the hospital protocol that only [intravenous] team nurses from the hospital were permitted to access the [intravenous] lines of a patient, like Steven, who had a central line in place." Appellee Parkview's Br. p. 23. Parkview, however, fails to support this assertion with citation to the record. Even if there is designated evidence to support this assertion, it is in direct conflict with Jacquelyn's affidavit.

Although Parkview suggested in its memorandum in support of summary judgment that Thurber "confessed" to Jacquelyn, there is no indication that Thurber informed Jacquelyn that he was acting in violation of Parkview policy and protocol. Appellants' App. p. 372. Jacquelyn did not have the same information that Parkview did regarding the propriety, or impropriety, of Thurber's actions. Accordingly, this evidence is sufficient to create a genuine issue of material fact regarding whether Steven and the Arnolds were adequately informed of Thurber's misconduct. The trial court properly denied Parkview's motion for summary judgment on this issue.

***B. Failure to Inform the Treating Physicians***

Parkview next argues that summary judgment should have been granted because there is no genuine issue of material fact regarding whether Steven's treating physicians were informed of Thurber's misconduct. In support of their argument, Parkview designated the affidavit of Christine Hepler, R.N. Hepler stated that on December 22, 1997, she discovered that intravenous bags containing morphine had been tampered with, that on December 24, 1997, she notified Steven's physician, Dr. Smith-Elekes of the leaking morphine from the bags and attempted to notify Dr. Bojrab, and that on December 26, 1997, she spoke with Dr. Bojrab, and discussed the tampering of Steven's morphine infusion.

As the Arnolds point out, this evidence does not indicate that either doctor was informed that Thurber had tampered with Steven's intravenous line on December 18, 1997, that Steven's morphine had been diluted or contaminated,<sup>10</sup> or that Thurber had a history of drug abuse.<sup>11</sup> Although Dr. Smith-Elekes may have been informed that the morphine bags were leaking on December 24, 1997, and Dr. Bojrab may have been informed that the morphine had been tampered with on December 26, 1997, there are

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<sup>10</sup> Parkview argues for the first time in its reply brief that there is no evidence of contamination in the record. To the contrary, the Arnolds both stated in their affidavits that they were informed by Parkview "that the test results of the morphine bags revealed 90-95% of the morphine was missing from the bags and replaced with a fluid consistent with tap water." Appellants' App. pp. 281, 286. Further, Parkview's April 2, 2003 supplemental designation of evidence contains the Arnolds's submission to the Review Panel, which included a narrative report of the facts. This report provided that the fluid Thurber used to replace the morphine was contaminated with serratia and pseudomonas bacteria. See id. at 328.

<sup>11</sup> In its Reply Brief, Parkview asserts, "Not only did Parkview not have a duty to report five-year old information to anyone, but it could have been defamatory to do so." Appellee Parkview's Reply Brief p. 5. These assertions are not supported by citation to legal authority and are waived. See Wenzel v. Hopper & Galliher, P.C., 830 N.E.2d 996, 1004 (Ind. Ct. App. 2005) (observing that the failure to make a cogent argument supported by legal authority results in waiver); Ind. Appellate Rule 46(A)(8).

questions of fact for a jury regarding when and to what extent Steven's treating physicians were notified of Thurber's misconduct in accessing Steven's intravenous line, Thurber's tampering with the bags, and the dilution and contamination of the morphine bags. Because there are questions of fact regarding whether the notification by Parkview to Steven's treating physicians was timely and adequate, the trial court properly denied Parkview's motion for summary judgment on this issue.

Parkview also argues that there are no genuine issues of material fact regarding whether its alleged failure to timely inform Steven's treating physicians of Thurber's misconduct caused Steven any harm. Parkview relies on the affidavit of Mark Reecer, M.D., who stated:

4. As further explanation and clarification of my opinions, on causation, it is my opinion that any alleged failure on the part of [Parkview] in December 1997 to immediately notify [Steven's] treating physicians that morphine bags had been tampered with played no role in the death of [Steven] one year later in December 1998.

5. Prior to the December 1997, admission, [Steven's] infectious disease specialist, Suzanne Smith-Elekes, DO had diagnosed [Steven] with end-stage acquired immune deficiency syndrome. Any delay by the hospital staff in notifying Dr. Smith-Elekes of the tampering of [Steven's] morphine bags on the night of December 17-18, 1997 until December 24, 1997, when it is documented that Dr. Smith-Elekes was notified of the tampering, was not a factor in any injuries to [Steven] or in his death in December 1998.

Appellants' App. p. 377.

In response, the Arnolds designated the affidavit of Martin Raff, M.D., who stated:

4. It is my opinion that in the clinical management of a patient with an infectious disease such as that suffered by

[Steven], it is incumbent upon the treating infectious disease physician to be made aware of each and every fact relevant to the causation and management of that particular infectious disease and its etiology (the causative organism and its source). This information is essential to the intelligent and effective treatment of that condition. It will, within a reasonable degree of medical probability, affect the choices of diagnostic procedures . . . , therapies, and adjunctive medical and nursing interventions. The failure to obtain such information violates the usual and customary standards of medical care.

5. It is my opinion that the failure to notify and provide this information to the treating physician, within a reasonable degree of medical probability and certainty is a deviation from acceptable standards of medical care and will hinder the medical management of a patient such as [Steven].

6. It is also my opinion that this failure to notify and provide this information to the treating physician will, within a reasonable degree of medical certainty, cause significant harm to a patient with a medical condition as the one which resulted in the death of [Steven].

Id. at 447.

Parkview contends that Dr. Raff's affidavit does not create a question of fact as to causation because he did not review Steven's medical records and because he makes his opinions in "generalities." Appellee Parkview's Br. p. 26. Dr. Raff's opinion was based on the Arnolds's and Parkview's submissions to the Review Panel, the opinion of the Review Panel, and the evidence designated by the Arnolds and Parkview in their various motions for and responses to motions for summary judgment. Parkview's argument

simply is an attack on the weight of the evidence, not whether it creates a genuine issue of fact for trial.<sup>12</sup>

Parkview also argues that Dr. Smith-Elekes testified in her deposition that her treatment of Steven would not have changed had she been informed of Thurber's conduct sooner. For the sake of this argument, we will assume that Dr. Smith-Elekes deposition was properly designated as evidence.<sup>13</sup> Dr. Smith-Elekes, however, was only one of Steven's treating physicians. In fact, in her deposition, she indicated that it was Dr. Bojrab, the physician responsible for Steven's pain management, who needed to know about the leaking morphine bags and that "she didn't really know what do with this information." Appellee Parkview's App. p. 13. Accordingly, although Dr. Smith-Elekes's deposition might challenge the weight to be given to Dr. Raff's affidavit, it is not enough to show that Parkview's allegedly improper informing of Steven's treating physicians did not cause any harm to Steven as a matter of law.

Further, Parkview, the movant, did not designate evidence suggesting that had all of Steven's treating physicians, including Dr. Bojrab, been adequately informed of Thurber's misconduct, their treatment of Steven would have remained unchanged. In a similar vein, it is undisputed that Steven was prescribed morphine to manage his pain and

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<sup>12</sup> For the first time in its reply brief, Parkview contends that an expert witness lacking detailed knowledge of a plaintiff's medical history has no basis for giving an opinion as to causation. Even assuming that Dr. Raff was not familiar with Steven's medical history, a party may not raise an issue for the first time in its reply brief. See Magwerks Corp., 829 N.E.2d at 977. Nevertheless, it appears that in their submission to the Review Panel, the Arnolds included Steven's medical records, and Dr. Raff indicated that his opinion was based on the Arnolds's submissions to the Review Panel.

<sup>13</sup> Based on the parties' Appendices, it is unclear what, if any, portions of the seventy-one page deposition were properly designated to the trial court.

that he was not receiving that morphine as prescribed. Thus, Steven's pain was not being managed as effectively as it should have been. This, as a matter of law, caused him harm. For these reasons, we conclude that there are genuine issues of material fact as to causation.

### ***C. Damages for Steven's Broken Humerus***

Parkview moved for summary judgment on the issue of the medical expenses owed to the Arnolds as the result of any negligence in its transfer of Arnold. Parkview argues that Dr. Reecer opined that the medical expenses associated with Steven's broken arm totaled \$663.00. In its motion, Parkview argued:

If granted, allegations concerning the transfer of [Steven] on October 8, 1997 would proceed to trial solely on the following issues:

- (1) Whether [Parkview] employees breached the standard of care with respect to the physical transfer of [Steven] at the time of his discharge on October 8, 1997;
- (2) Whether said breach in the standard of care resulted in a fracture of the left humerus of [Steven]; and
- (3) The damages sustained as a result of said fracture which include medical expenses of \$663.00 plus any pain and suffering associated with that injury.

Appellants' App. p. 371. The trial court acknowledged that the broken arm played no role in Steven's death but determined that the matter of damages should be left to a full presentation of evidence at trial.

The Arnolds make the same argument on appeal that they made in response to Parkview's motion for summary judgment—that the Arnolds should be able to recover damages for the:

nature and extent of his injuries and the effect of these injuries on Steven's ability to function as a whole person, the physical pain and suffering experienced due to his injuries, the value of lost time, the reasonable expense of necessary medical care, treatment, and services, plus other elements of damages for personal injuries.

Appellants' Reply Br. p. 38-39. Although the Arnolds object to Dr. Reecer's statement being a conclusive determination of damages, they do not specifically argue that it was an improper assessment of medical expenses associated with Steven's broken arm. However, because the total damages sustained by Steven are not ascertainable on summary judgment, the trial court properly denied Parkview's motion for summary judgment on this issue.

### **Conclusion**

The trial court improperly granted summary judgment on the Arnolds's negligent hiring, negligent supervision, and vicarious liability claims because New Horizons did not move for summary judgment or designate appropriate evidence on those claims. The trial court properly granted summary judgment on the Arnolds's claim that New Horizons failed to properly investigate the January 6, 1998 incident because the Arnolds failed to designate evidence showing how Steven or they were harmed by the alleged failure to investigate.

The trial court improperly granted summary judgment in favor of Parkview on the Arnolds's vicarious liability claim because Parkview did not move for summary judgment or designate appropriate evidence on that claim. Further, the trial court improperly granted summary judgment with regard to the relevant failure to inform claims because the subsequent deposition testimony of the Review Panel members is not conclusive of Parkview's liability in light of the Review Panel's original decision.

Finally, the trial court properly denied summary judgment for Parkview regarding whether Parkview failed to inform Steven and the Arnolds of Thurber's tampering with the intravenous line. The trial court properly denied summary judgment for Parkview regarding whether it timely and adequately informed Steven's treating physicians of Thurber's tampering, the dilution and contamination of the morphine, and Thurber's history of drug abuse. The trial court properly denied summary judgment on Parkview's assertion that any alleged failure to inform was not the proximate cause of harm to Steven. The trial court properly denied Parkview's motion for summary judgment on the issue of damages resulting from the broken arm. There are genuine issues of material fact with regard to all of these issues. We affirm in part, reverse in part, and remand.

Affirmed in part, reversed in part, and remanded.

FRIEDLANDER, J., and MATHIAS, J., concur.